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In the

Supreme Court of the United States

OCTOBER TERM, 1966

INTERSTATE CIRCUIT, INC., et al.,
Petitioners,

v.

CITY OF DALLAS,
Respondent.

On Petition For a Writ of Certiorari To the United States Circuit Court of Appeals For the Fifth Circuit

BRIEF OF THE CITY OF DALLAS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The Opinion of the Court of Appeals for the Fifth Circuit (Pet. App. B, p. B-52) is reported at 366 Fed. 2d 590. The

Opinion of the District Court for the Northern District of Texas (Pet. App. B, p. B-1) is reported at 249 F. Supp. 19.

JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit was entered on August 30, 1966 (R. 515). Petition for Rehearing was denied on October 18, 1966 (R. 573). The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1).

QUESTIONS PRESENTED

(1) Whether the Court of Appeals was correct in holding that the procedure for review set forth in Ordinance No. 11284 complies with constitutional standards and safeguards?

(2) Whether the Court of Appeals was correct in holding that the standards in Ordinance No. 11284 are constitutional because they are neither too vague nor indefinite to meet constitutional standards?

(3) Whether the Court of Appeals was correct in holding that Article 527 of the Texas Penal Code does not preempt the field of regulating motion pictures?

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

Amendment I, Constitution of the United States (Pet. App. A, p. A-1).

Article 527, Texas Penal Code (Pet. App. A, p. A-17).

Ordinance No. 11284 of the City of Dallas, Texas (Pet. App. A, p. A-1)

STATEMENT

This Respondent agrees with the Statement made by the Petitioners in their Petition for a Writ of Certiorari, with the exception of the last two paragraphs thereof, wherein they refer to matters not before the Court of Appeals, but matters submitted in a Motion to Enlarge the Record. This Motion was denied. Therefore, this Respondent does not agree as to any statement made concerning the "ten cases" as they were filed immediately before and after the case involving the picture *Viva Maria*. These cases did not arise under Ordinance No. 11284 and could have no bearing on any decision affecting this Ordinance. The "ten cases" referred to did not even involve the City of Dallas and are purely extraneous. Absent any consideration given this part of Petitioners' Statement, we would agree with the Statement as presented by the Petitioners.

ARGUMENT

(1) The Court of Appeals, in a very lucid opinion, answered the question as to the constitutionality of Ordinance No. 11284 insofar as the prompt judicial review feature is concerned. The Court's opinion is based on the opinion by this Court in *Freedman v. State of Maryland*, 380 U.S. 51, wherein this Court set out the requirements of such a law and the manner in which the judicial review must be handled. The Court of Appeals then summarized the Dallas Ordinance to show that the procedures were followed. It is true that the Court of Appeals made the statement:

> "* * * So long as the courts are willing to cooperate in this manner, *Freedman's* requirement for speedy ju-

> dicial action on the merits and on review are satisfied." (R. 485).

If the courts do not give this cooperation, and a speedy judicial review as required by Ordinance No. 11284 is not given, the classification of the Board is suspended until due process is afforded the exhibitor, and during the intervening time, he may exhibit his film without classification. This leaves him no room for complaint since he is neither under injunction nor subject to prosecution. (Section 46A-7(b), Pet. App. A, p. A-15).

Ordinance No. 11284 has been construed by the State Courts of Texas in the case of *Interstate Circuit, Inc. v. City of Dallas*, 402 S.W. 2d 770, writ of error refused, in which the Court of Civil Appeals at Dallas affirmed the judgment of the District Court. In this case, involving the motion picture *Viva Maria*, the Court of Civil Appeals, in sustaining the validity of the ordinance against the attack of inadequate judicial review, said on page 774:

> "The case now before us was filed in the trial court February 14, 1966, tried February 18, 1966, submitted to this court March 28, 1966 and decided April 5, 1966. Appellants surely have no real basis to complain that the judicial procedural time table has been inadequate to meet the requirements set out in the Freedman case."

In the case of *Jacobellis v. State of Ohio*, 378 U.S. 184, 195, this Court pointed the way for the enactment of an ordinance, such as Ordinance No. 11284, when it said that the objectives of local authorities could be better served

> "* * * by laws aimed specifically at preventing distribution of objectionable material to children, rather than at totally prohibiting its dissemination."

Again this Court in *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, pointed out that the State has an interest in the welfare of children and that even the family itself is not beyond regulation in the public interest.

In *Bantam Books v. Sullivan*, 372 U.S. 58, 70, this Court pointed out the failures and mistakes of previous laws to grant "judicial superintendence" and their failure to assure "an almost immediate judicial determination of the validity of the restraint." However, the Court did point out that a system of prior restraint would be tolerated if these conditions were met. The Dallas Ordinance has provided procedures to meet these conditions.

Kingsley Books v. Brown, 354 U.S. 436, states that the liberty of speech is not an absolute right with no limitations whatsoever, and refers to the article of Professor Paul Freund:

> "'What is needed,' writes Professor Paul Freund, 'is a pragmatic assessment of its operation in the particular circumstances. The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to more particularistic analysis.' * * *" (p. 442)

Thus, from the foregoing, it is obvious that Petitioners' contention that the judicial review afforded does not comply with the requirements as set forth in *Freedman v. State of Maryland, supra*, is untenable.

(2) The Court of Appeals squarely considered the "vagueness" argument submitted by the Petitioners. In holding that Ordinance No. 11284 was not too vague or indefinite, the Court of Appeals added this limitation - "as restricted by the District Court." (366 Fed. 2d 590, 599, Pet. App. B, p. B-37).

It is with this limitation that Respondent disagrees and has pointed out its disagreement in Respondent's Petition for a Writ of Certiorari to this Court. Without this limitation, the opinion of the Court of Appeals was correct.

The discussion of this Court in *Roth v. United States*, 354 U.S. 476, concerning vague and indefinite language in Legislation such as this, shows that this court has not required an impossible standard even in obscenity cases; all that is required is a standard as set forth in *United States v. Petrillo*, 332 U.S. 1, 7, which holds:

> "* * *; but the Constitution does not require impossible standards. The language here challenged conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. The Constitution requires no more."

In *Beauharnais v. Illinois* 343 U.S. 250, 264, this Court held that the law was not so "ill-defined" that men acting under a statute and judges and juries in applying it could not draw from it some adequate standards to guide them. This is applying the rule of reasoning of normal men in the interpretation of commonly used phrases or terms.

This was the reasoning by this Court in *American Communications Association v. Douds*, 339 U.S. 382, 412, when the Court stated:

> "* * * The applicable standard, however, is not one of wholly consistent academic definition of abstract terms. It is, rather, the practical criterion of fair notice to those to whom the statute is directed. The particular context is all important."

(3) Petitioners' argument that Article 527 of the Texas Penal Code preempted the field of motion picture regulation

is without merit. This same argument has been strongly and repeatedly urged in the Texas Courts, and it has been specifically rejected by them, including the Supreme Court of Texas in *Interstate Circuit, Inc. v. City of Dallas, supra,* writ refused (no reversible error).

CONCLUSION

The Writ of Certorari on the points as presented by Petitioners should be denied.

Respectfully submitted,

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By .....
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Service of the within and receipt of a copy thereof is hereby admitted this ..... day of February 1967.

.....
Attorney for Petitioners